In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 980

AKIN DISTRIBUTORS INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A2) is reported at 399 F. 2d 306.

JURISDICTION

The judgment of the court of appeals (Pet. App. A3) was entered on July 29, 1968. A petition for rehearing was denied on December 11, 1968 (Pet. App. A4). Mr. Justice Black extended the time for filing

a petition for a writ of certiorari to February 9, 1969, and the petition was filed on January 27, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the inspection of petitioner's warehouse where food was held for sale constituted an unreasonable search in violation of the Fourth Amendment.

2. Whether petitioner was properly charged with and convicted of four separate offenses.

STATEMENT

After a nonjury trial in the Middle District of Florida, petitioner was convicted on a four count information charging that it had violated 21 U.S.C. 331 (k) by allowing food which it was holding for sale, after shipment in interstate commerce, to become adulterated as defined in 21 U.S.C. 342(a)(3) and 342(a)(4), and was fined $500 on each count (R. 262). Each of the counts was based upon a different food—*viz.*, whole wheat flour received from Akin Distributors in Tulsa, Oklahoma (R. 4-5); white flour, received from the same source (R. 6); wheat germ meal, received from General Mills in Minneapolis, Minnesota (R. 8); and soya flour, received from El Molino Mills in Alhambra, California (R. 9).

The adulteration of the food was discovered during a three day inspection of petitioner's warehouse by two inspectors of the Food and Drug Administration and a food plant inspector of the Florida Department of Agriculture. On the first day, petitioner's manager

was not present (R. 87). The inspectors, after displaying their credentials and issuing a notice of inspection (R. 112, 122, 128-129, 265), were admitted by Gerry N. Council, who stated that he was the warehouse foreman and in charge in the manager's absence (R. 109, 128-129, 265). Council accompanied the inspectors on their inspection (R. 115). On the second and third day, the manager was present (R. 90, 98, 131-132). The inspectors showed him their credentials (R. 131), and he saw the notice of inspection which had been issued the first day (R. 92, 107). He raised no objection either to the inspection or to the taking of samples (R. 98-99, 131-132). He voluntarily signed a slip acknowledging the origin of each of the samples taken by the inspectors, and voluntarily instructed his subordinates to destroy the items found by the inspectors to be contaminated (R. 100-101).

Council's status was the subject of dispute at the hearing on petitioner's motion to suppress. The manager testified that Council was only a shipping clerk with neither managerial authority nor authority over the warehouse in the manager's absence and more specifically that he was not authorized to admit the inspectors (R. 82-83). On cross-examination, however, the manager acknowledged that while Council did not formally carry the title of warehouse foreman, he impliedly did (R. 96). Council testified that, after the man who formerly had been foreman had left his job, the manager told him that he was foreman, and that he had never had any doubts as to his position until he heard the manager testify (R. 109-111). Council further stated that, on the day

in question, the manager, before leaving told him to watch things (R. 113), and specifically instructed him to admit the inspectors if they came but to be sure to accompany them during their inspection (R. 112, 114, 120). The manager acknowledged that he was under instructions from the home office to permit inspections by the Food and Drug Administration and to assist and accompany the inspectors (R. 104), and that as a matter of policy any customer upon request would be shown around the warehouse and permitted to inspect it (R. 103). The inspectors at no time made any threats of any sort in order to obtain permission to conduct the inspection (R. 145).

ARGUMENT

1. The court of appeals correctly held that petitioner, through its agents (*i.e.*, Council and the manager), consented to the inspection. The evidence clearly supported a finding that Council had both authority and specific instructions to permit the inspection. Moreover, the manager—who clearly had authority to act for petitioner—ratified Council's initial permission by acquiescing in the inspection and cooperating with the inspectors on the second and third day. Compare *Golden Grain Macaroni Co.* v. *United States*, 209 F. 2d 166, 167 (C.A. 9).

Petitioner also contends that, in light of *Camara* v. *Municipal Court*, 387 U.S. 523, and *See* v. *City of Seattle*, 387 U.S. 541, the consent cannot be deemed voluntary because of the coercive effect of 21 U.S.C. 331(f) which makes it unlawful to refuse to permit entry or inspection. *Camara* and *See*, however, held only that

the owners of property sought to be inspected are privileged to refuse permission to inspect in the absence of a search warrant, and cannot be punished for such refusal. The two cases did not hold that a statute purporting to authorize such punishment *per se* vitiates an otherwise voluntary consent. To the contrary, in *Camara* the Court noted that the requirement of a warrant after refusal of entry is not burdensome because "most citizens allow inspections of their property without a warrant." 387 U.S. at 539. Here the inspectors made no effort to overbear the wills of either Council or the manager by threatening prosecution under § 331(f) if permission to inspect was withheld. There is no reason, therefore, to find the permission other than voluntary.

2. Petitioner contends that it was, in effect, convicted of only a single course of conduct—*i.e.*, permitting its refrigeration units to fall into disrepair and thus create a condition whereby food adulteration could result—and hence that its conviction and sentence on four separate counts was improper. Section 331(k), however, does not denounce the creation of a general contaminating condition, but rather "the doing of any * * * act with respect to a food" which "results in such article being adulterated * * *." Conviction under the statute thus requires a showing that an act (*e.g.*, storing under unsanitary conditions) was done "with respect to a food" which caused that food to become adulterated within the statutory definitions as set forth, *inter alia*, in §§ 342(a)(3) and 342(a)(4). See *United States* v. *Wiesenfeld Warehouse Co.*, 376 U.S. 86, 91. Manifestly, the deleteri-

ous result against which the statute protects increases in proportion to the number of separate articles of food which are acted upon in the forbidden way. Here the essence of the charges was not that petitioner allowed his refrigeration unit to fall into disrepair, but rather that he stored four separate shipments of food under such conditions that each became adulterated. It is irrelevant whether the four shipments were stored in the same area or in separate areas.[1] Thus, it was proper to charge petitioner separately with regard to each of the foods it allowed to become contaminated.

CONCLUSION

For the foreging reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1969.

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[1] In fact, the foods named in the first two counts were stored in one cooler room (R. 170, 173) and the foods named in the last two in another (R. 175). The refrigeration unit in the first room had been broken down for a considerably longer period than the unit in the second room (R. 235).

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